

KAUA‘I PLANNING COMMISSION
REGULAR MEETING
March 8, 2016

The regular meeting of the Planning Commission of the County of Kaua‘i was called to order by Chair Mahoney at 9:05 a.m., at the Līhu‘e Civic Center, Mo‘ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Chair Sean Mahoney
Vice Chair Louis Abrams
Mr. Wayne Katayama
Mr. Roy Ho
Ms. Glenda Nogami Streufert

Absent and Excused:
Mr. Kimo Keawe

The following staff members were present: Planning Department – Michael Dahilig, Leslie Takasaki, Jody Galinato, Dale Cua; Deputy County Attorney Jodi Higuchi-Sayegusa, Office of Boards and Commissions – Administrator Jay Furfaro, Commission Support Clerk Darcie Agaran

Prior to the start of the meeting, Council Administrative Assistant Eddie Topenio gave the Oath of Office to new Commission Member Glenda Nogami Streufert.

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Chair Mahoney called the meeting to order at 9:05 a.m.

ROLL CALL

Planning Director Michael Dahilig: Good morning, Commissioners. Vice Chair Abrams?

Mr. Abrams: Here.

Mr. Dahilig: Commissioner Ho?

Mr. Ho: Here.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Here.

Mr. Dahilig: Commissioner Keawe? Commissioner Nogami Streufert?

Ms. Nogami Streufert: Here.

Mr. Dahilig: Chair Mahoney?

Chair Mahoney: Here.

Mr. Dahilig: You have five (5) members present, Mr. Chair.

APPROVAL OF THE AGENDA

Mr. Dahilig: You do have Approval of the Agenda. If I could recommend to the Commission that it move Item I.6. immediately after Hearings and Public Comment, and immediately after that, move Item K, the Subdivision Committee Reports, immediately after that moved I.6. And then that it, as part of this motion, defer Item L.1. to the next available Planning Commission meeting, given the transmittal from Mr. Max Graham as circulated under...April 26th, my apologies, given the letter of Mr. Graham in the supplemental memorandum on Item L.1., which is Unfinished Business. He had a, I guess, an emergency meeting on the mainland and is asking for a deferral.

Chair Mahoney: Chair will entertain a motion.

Mr. Abrams: I'm making a motion to change the agenda. Do I also...you also want me to defer Somers' one to April 26th?

Mr. Dahilig: Yes.

Mr. Abrams: Also at the same time?

Mr. Dahilig: Yes.

Mr. Abrams: So moved.

Ms. Nogami Streufert: Second.

Chair Mahoney: It's been moved and seconded. Any discussion? Hearing none. All in favor? (Unanimous voice vote) Motion carries 5:0.

MINUTES of the meeting(s) of the Planning Commission

Mr. Dahilig: Thank you, Mr. Chair. We now have Minutes of the Planning Commission. We have no minutes for approval this morning.

RECEIPT OF ITEMS FOR THE RECORD

Mr. Dahilig: We are now on items for receipt for the record. We have circulated a supplemental memorandum that does have responses and testimonies, as well as Mr. Graham's letter that was included in that testimony. A motion to receive would be appropriate at this time.

Chair Mahoney: Chair will entertain a motion.

Mr. Abrams: So moved.

Mr. Katayama: Second.

Chair Mahoney: Moved and seconded. Any discussion? Hearing none. All in favor? (Unanimous voice vote) Opposed? (None) The motion carries 5:0.

HEARINGS AND PUBLIC COMMENT

Continued Agency Hearing (NONE)

New Agency Hearing (NONE)

Continued Public Hearing (NONE)

New Public Hearing (NONE)

All remaining public testimony pursuant to HRS 92 (Sunshine Law)

Mr. Dahilig: Thank you, Mr. Chair. We are now on Hearings and Public Comment. We do not have any continued agency hearings, any new agency hearings, any continued public hearings, and any new public hearings. We do have one (1) member of the public that has signed up to talk on Item G.1.a. This is related to Coconut Beach Development, LLC's status report.

Ms. Regush, would you like to take your opportunity to testify now? Or at the agenda item?

Rayne Regush: I can do it during the agenda item provided it's not moved to the end of the day.

Mr. Dahilig: Okay.

Ms. Regush: Thank you.

Mr. Dahilig: Mr. Chair, we have nobody else that has signed up to testify under Item F.5.

GENERAL BUSINESS MATTERS

Special Management Area Minor Permit SMA(M)-2013-22 to accommodate commercial tour boat loading and unloading activities at Black Pot Beach Park in Hanalei (pursuant to the "Peddlers and Concessionaries" ordinance), situated at the northern terminus of Weke Road,

further identified as Tax Map Keys 5-5-001: 004 & 011, and containing a total land area of 6.19 acres = County of Kaua‘i, Department of Parks and Recreation.

Mr. Dahilig: We are now on Item I.6. This is the Special Management Area Minor Permit SMA(M)-2013-22 to accommodate commercial tour boat loading and unloading activities at Black Pot Beach Park in Hanalei (pursuant to the “Peddlers and Concessionaries” ordinance), situated at the north terminus of Weke Road, further identified as Tax Map Keys 5-5-001 Parcels 4 and 11, and containing a total area of 6.19 acres. The applicant is the County of Kaua‘i Parks Department.

Mr. Chair, we took a look at this agenda posting and we discovered that there was a minor errata that may place into question the proceedings today. After consultation with the County Attorney’s office, the Attorney’s office believes it is prudent to recommend a deferral of the item and reposting because of the nature of the current posting in the agenda and in order to meet Sunshine Law. Therefore, the Department would ask that the matter be moved to 6/28, June 28th, for final oral arguments and any action for any pending Decisions and Order, Findings of Fact, and Conclusions of Law. That would be the recommendation of the Department. I know that there is an intervenor here that is present that may want to speak on this item as well, but that would be our request to the Commission.

Chair Mahoney: Chair will entertain a motion.

Mr. Abrams: Move to defer Special Management Area Permit SMA(M)-2013-22 to our June 28th calendar.

Ms. Nogami Streufert: Second.

Chair Mahoney: It’s been moved and seconded. Any discussion? Hearing none. All in favor? (Unanimous voice vote) Opposed? (None) Motion carries 5:0.

Mr. Dahilig: Thank you, Mr. Chair.

COMMITTEE REPORTS

Subdivision

Mr. Dahilig: We are now on Item K. This is the Subdivision Committee Report. I believe one has been circulated, Mr. Chair.

Mr. Abrams: Yes. Mr. Chair, Subdivision Committee Report No. 10 met today and entertained three (3) applications. The first one was First Assembly of God in Hanamā‘ulu, tentative subdivision approval for Subdivision Application No. S-2016-12. That was approved on a 3:0 vote. Second was tentative subdivision action on Subdivision Application No. S-2016-14, Helen Martin, Kalāheo. That was also approved. And the last one was the final subdivision map

approval to Application No. S-2007-16, Jack Nishimoto et al in Niumalu. That was all approved a 3:0 vote. That's the end of our Subdivision report.

Chair Mahoney: Okay, thank you. Chair will entertain a motion to approve.

Mr. Katayama: Move to approve.

Ms. Nogami Streufert: Second.

Chair Mahoney: Moved and seconded. Any further discussion? Hearing none. All in favor? (Unanimous voice vote) Motion carries 5:0. Thank you.

CONSENT CALENDAR

Status Reports

2016 Annual Status Report for Special Management Area Use Permit SMA(U)-2006-4, Project Development Use Permit PDU-2006-6 and Class IV Zoning Permit Z-IV-2006-9, Tax Map Key 4-3-002:015, 16 & 20 = *Coconut Beach Development, LLC*.

Mr. Dahilig: Thank you, Mr. Chair. We are back to the Consent Calendar. We have one (1) item for consent this morning. This is the status report for SMA Use Permit SMA(U)-2006-4, Project Development Use Permit PDU-2006-6, and Class IV Zoning Permit Z-IV-2006-9; Tax Map Key 4-3-002, Parcels 15, 16, and 20. The applicant is Coconut Beach Development, LLC and there is a Director's Report to this matter.

That's all that we have for the Consent Calendar for your acceptance this morning, Mr. Chair.

Chair Mahoney: Okay. Chair will entertain a motion.

Mr. Dahilig: Mr. Chair, I believe that there is one (1) member of the public that would like to testify on this agenda item.

Chair Mahoney: Oh, Ms. Rayne Regush. Please state your name for the record, please.

Ms. Regush: Thank you. Good morning, Commissioners. My name is Rayne Regush. I'll be providing comments from the Sierra Club Kaua'i Group Executive Committee and also from the Wailua-Kapa'a Neighborhood Association Board of Directors. This is a project that we've tracked closely since 2005, and we just wanted to highlight some concerns, particularly where the details are lacking and some more specific responses would be helpful. As you know, the Commission requested and approved revisions to the site plan at their December 2014 meeting, and now the Director is recommending that the deadline for completion of all the necessary permits for construction and building for the first phase be extended to December 2016.

Deputy County Attorney Jodi Higuchi-Sayegusa left the meeting at 9:13 a.m.

Ms. Regush: So we ask if Commissioners believe that all these permit requirements and approvals will be secured in the next ten (10) months. If you follow along and look at Exhibit A, which is the Status of Permit Requirements, the matrix that was prepared by Staff, there are many conditions identified as “Not Met”, and in fact, very little has changed since the developers’ 2015 status report last year. Item 10 still notes that no building permits have been approved as of this date. So, this fact is worrying some residents because heavy equipment has been brought in, and yesterday, the ground was turned in the northwest corner. We understand from the Engineering Division that no grubbing and grading and stockpiling permits have been issued yet. So hopefully Commissioners will ask some of the same questions that we’ll raise about the status report requirements.

The first is regarding Condition No. 1. Do we know when the developer contracted for an updated traffic analysis report as requested by DOT? And when might that report be completed?

Item No. 2. When will the developer submit the \$1.4 million payment of wastewater fees and sewer connection charges? In other words, where in this process does that happen?

Item No. 3.c. When will the developer submit a Performance Bond or insurance or a Community Finance District Bond to be approved by the County? So again, is there a timeline when this should occur?

Condition No. 3.d. Did the developer resubmit modified plans to Public Works after Commissioners approved the revisions to the site plan in December 2014? And if so, when was this done? And when was the revised grading plan permit application submitted?

Ms. Higuchi-Sayegusa returned to the meeting at 9:15 a.m.

Then, for Item...Condition No. 3.e., the emergency evacuation plan. This item is still under review by Civil Defense and therefore, the permit requirement should be checked off in the box “Not Met”, instead of “Met”.

Then for Item No. 4.a., which requires a current certified shoreline, and it states that the shoreline was certified on June 17th...

Mr. Dahilig: Three (3) minutes, Mr. Chair.

Chair Mahoney: Could you wrap up your testimony, please?

Ms. Regush: If I may ask, Commissioner, since I am providing for two (2) groups...

Chair Mahoney: You have three (3) minutes. You can wrap up your...

Ms. Regush: May I get an additional three (3) minutes?

Chair Mahoney: No, you can wrap up your testimony. You have three (3) minutes. Please.

Ms. Regush: So regarding this certified shoreline, I hope Commissioners got a copy of the letter that Sierra Club sent to DLNR with the photographs showing how the high wash of the waves have moved in substantially landward. However, it's been disregarded, just a month later in the surveyor's permit application for a shoreline application, so it's important to answer...for the County to answer the question whether the building setbacks will be recalculated based on the new shoreline that the applicant is applying for.

So to wrap up, little has changed since the developer's 2015 status report and I think we would all benefit if the developer provided more details along with the anticipated timelines for each permit requirement. Thank you. Any questions?

Chair Mahoney: Thank you for your testimony. Any questions for the...from the...?

Ms. Regush: So may I pose a question since I was...?

Chair Mahoney: You had your testimony.

Ms. Regush: I was...next time, for my edification, should I reserve three (3) minutes for the first organization I'm testifying for?

Chair Mahoney: You have three (3) minutes.

Ms. Regush: And then come back a second time for another organization on their behalf?

Chair Mahoney: I think three (3) minutes...

Ms. Regush: What's the protocol?

Chair Mahoney: You have three (3) minutes to testify on whatever you are going to testify on.

Ms. Regush: For each organization that I'm speaking on behalf of?

Chair Mahoney: I think if you are going to come up to testify, you should try to...you are representing two (2)...maybe somebody else should come up for the three (3) minutes. You have three (3) minutes, so if you can compile the two (2) sections into three (3) minutes, then you can do it in three (3) minutes. If not, then maybe somebody else from the organization could come up and testify for three (3) minutes.

Ms. Regush: Thank you.

Mr. Dahilig: Mr. Chair, the status report is on the Consent Calendar. Per the Commission rules, if... We do have the applicant, as well as the Planner, available in case there are questions, but unless there are two (2) Commissioners in the affirmative that want to pull this item from the agenda and move it to New Business, the Consent Calendar will stand as approved.

Mr. Katayama: Mr. Chair, I move to further address the questions and the status on the report.

Mr. Abrams: Second.

Chair Mahoney: Okay. It's been moved and seconded.

Mr. Dahilig: That's all you need.

Chair Mahoney: Okay, we can take that up.

Mr. Dahilig: So Mr. Chair, we'll then move the item to New Business under Item M, unless you'd like to take it now out of order. It's the pleasure of the Commission.

Chair Mahoney: Why don't we take it now?

NEW BUSINESS

2016 Annual Status Report for Special Management Area Use Permit SMA(U)-2006-4, Project Development Use Permit PDU-2006-6 and Class IV Zoning Permit Z-IV-2006-9, Tax Map Key 4-3-002:015, 16 & 20 = Coconut Beach Development, LLC.

Staff Planner Jody Galinato: Jody Galinato, Staff Planner. I'm available to answer any questions. I would say most of them would be best answered by the applicant regarding deadlines. We won't issue a permit until all the conditions have been met. We are aware of the shoreline discrepancies, but we won't issue a permit until the shoreline is certified and I explained this to Rayne, but the...when this was... This was a contested case and this was a lawsuit. The new shoreline setback ordinance does not apply to this project, so what it would apply to would be anything new and we would need a valid shoreline certification prior to issuance of a building permit, and I know that they are working on determining jurisdiction on some trees that they want to remove, so that would be relevant to that. The Planning Commission doesn't act on shoreline disputes, so that will be handled at the state-level. Other than that, I'm just relying on what the applicant has given me regarding the status with each department, and holding off on issuing permits until everything is complied with.

Chair Mahoney: Any questions for the Planner from the Commissioners?

Mr. Katayama: Chair, you know, this has been sort of a long process and sort of a convoluted process because of the...sort of the legal entanglements. Maybe if the Department...Mike, if you can sort of...because most of the Commissioners here are probably not familiar with the historical prospective of this application. Maybe you can, sort of, give a brief summary of how we got to where we are today, and then we can have, maybe, the applicant come up and clarify some of the questions on the status report. Thank you.

Mr. Dahilig: I believe it was in Fiscal Year '06 that the original permit application came forward before the Planning Commission that included an exaction concerning the widening of Kūhiō Highway, and that was approved over the objection of the applicant who then took that to the courts to appeal the condition as being...as having no...I guess from proportionality standpoint,

that the exaction was not proportional to what was being built; that the whole burden of traffic mitigation was being placed on the applicant to bear the cost of widening that highway. The judge agreed and, in effect, created a permit, via court order, that had a number of conditions and a number of timelines; many of which the Planning Commission did put in there. Many of them there to facilitate what preemption issues would be addressed because of the court order. For instance, what laws apply going forward, knowing that laws are changing? What deadlines apply, etc., so the property has gone through this, I guess, cooling off period where certain deadlines to start applying for design reviews, etc. started to get triggered and I think, I believe, some of you were on this body when that design review happened about eighteen (18) months ago...about a little over a year ago, so you are starting to see the ball rolling right now. So these deadlines have, in effect, been tolled because of the litigation and now are adjusted to reflect some of the things that you are seeing here, so that's why there has been a long delay in the project. As with any project that we do along the shoreline, we need to rely, first, on the termination by the Board of Land and Natural Resources on where the shoreline is, and where the shoreline is, then everything flows naturally from that particular action. We are aware that the applicant has submitted and DLNR has confirmed that they have received an application from the applicant to actually have the shoreline certified, and that is a very public process. Ms. Regush has been out many times before and will probably attend again when they do a public review of the shoreline, upon which time the State surveyor will confirm whether or not there is a shoreline here or there as addressed in the application. At that point, we can then move forward with the...all the other plans regarding building, etc. so that we can...all the construction plans will fall naturally from that. So the timelines that are incumbent on construction a lot of times are really reliant on other State and Federal processes that we have no control over. So when we review the status reports, we also keep in mind that there may be a lag that is happening, but it's not from a standpoint of the applicant causing the delay, rather it is because it is going through the very public process. As we all know, the public process for contested case hearing also applies for shoreline certifications, so if there is a situation where a lawsuit may arise, that also tolls these timelines. So we don't anticipate breaches, normally, of timelines, as long as the applicant is explaining what...the procedures and processes they are going through and as long as there seems to be forward progress. Pardon the football term, but that's essentially what we are concerned about; whether there is forward progress or there is no forward progress at all. Just to give you a history, Commissioner Katayama, that's kind of where we are at this point.

Mr. Katayama: Thank you. And I think that's important.

Ms. Galinato: I would add one (1) additional thing is when we did the design review, when that got approved in December 2014, this Commission actually did make some significant changes to the site plan to allow for additional view plain, so that could've caused delays with changes of plans and stuff for the applicant.

Chair Mahoney: Thank you.

Mr. Abrams: I have a question for Jody. Your staff report and this matrix, is this duplicated in response to how they have structured their status letter, annual report letter? Are these all with the conditions that are actually now on?

Ms. Galinato: Yes. My status report is the word-for-word conditions from the court order, and then I just used what the applicant has given me to keep track of it.

Mr. Abrams: Yeah, okay, and then the applicant has their response after each condition, yeah?

Ms. Galinato: Yes.

Mr. Abrams: I was looking at trying to find Condition...is it 6? Which is the condition relative to the shoreline survey? Or is there one?

Unidentified Speaker: 4.a.

Mr. Abrams: 4.a., okay.

Ms. Galinato: Yes, 4.a.

Mr. Abrams: Okay. So we can ask the... I'm assuming that back in 2014 if they had a shoreline survey fairly ready to go, that would have expired. Was that correct?

Ms. Galinato: That's correct, but they did submit for their first building permit prior to the expiration of this.

Mr. Abrams: I see.

Ms. Galinato: But we have not issued that permit because all the conditions have not been complied with.

Mr. Abrams: Okay. Thank you.

Chair Mahoney: Any further questions for the Planner? Is there a representative for the...oh, I'm sorry. Commissioner Ho.

Mr. Ho: Jody, right now they have no permit to proceed with any of the work?

Ms. Galinato: I know that they are very close to...and the applicant could probably answer...I know they are getting ready to do the grading, and they are going to be putting up dust screens, which is fine with us. We have asked for provisions that they maintain the beach access lateral and then on each side.

Mr. Ho: So any work within the property itself, without the DLNR's shoreline survey, can proceed?

Ms. Galinato: As far as this Department is concerned, they can proceed with their grading as long as it's okay with Public Works Engineering.

Mr. Dahilig: Let me add to that. There is grading, and then there is also Best Management Practices that have to be installed to facilitate the grading; like the dust fences. So those do not, per se, require the permits of a normal structure because they are actually being put in as silt with retention types of things in order to facilitate the grading itself. While the grading may be undergoing, they are allowed to put in the dust screens to actually facilitate the grading. That does not require additional permits because it is part of the overall Best Management Practice that is required of them to actually start moving dirt and constructing on the site. So we...they have consulted with us ahead of time and asked, you know, do we need a separate permit for this? Do we not? I said no, we do this because our concern about flying dust and fugitive dust is of paramount concern both for an environmental standpoint, as well as a neighborly standpoint. So those are clearly temporary structures as part of the overall building process, so we do not view those as needing separate permits to, you know, design the dust screens because they are taken out as part of the construction.

Chair Mahoney: Okay. Any further questions for the Planner? Hearing none. Oh, you have some?

Ms. Nogami Streufert: Yes.

Chair Mahoney: Okay.

Ms. Nogami Streufert: If I could. Jody, if...or maybe this is to Mike. If the shoreline has to be recertified for the...and that takes longer than anticipated so that the applicant has less time to complete all their permitting by December '16. If it's not based on their inaction, are they held responsible for that? Or does that...how does that work?

Mr. Dahilig: Because the requirements are, in effect, handled by judicial court order, you know, I think we've talked about this before with the applicant that we would possibly have to look at...if they wanted an extension, actually look at it through getting court authorization versus, you know, Planning Commission authorization because of the way that the permits were approved. It becomes more a position of where the County would appear before the judge and say, you know, have they been diligent in trying to meet these deadlines? Was the elongated shoreline certification process, which is out of their control, contributing to this delay and inability to meet that deadline? So it's hard for me to speak for what the judge and the circumstance would say, but I would suspect that that's the type of arguments that would be made at court in case that December deadline does come and they need more time.

Ms. Galinato: Actually, in Condition No. 10, it does state that the time period set forth above shall be extended for good cause, including but not limited to any delays in the agents of building or other permits and approvals. So I think, you know, we are okay in extending that I would believe. Jodi? (Laughter)

Ms. Nogami Streufert: Thank you.

Chair Mahoney: Any other questions? At this time, could we have the representative for the applicant step forward and state your name for the record, please?

Naomi Kuwaye: Good morning, Chair and Commissioners. My name is Naomi Kuwaye. I'm the representative for the applicant, and with me is Larry Smith, the owner of the company.

Just three (3) updates that I wanted to provide you since our staff report...I mean, sorry, our status report was issued. The first one is with respect to No. 2. Our wastewater fee was paid for eighteen (18) units of the first phase, and that was on June 15, 2015. Item No. 5. Our declarations of conditions and declaration of easements agreement were both filed with the Bureau of Conveyances on June 16, 2015 with the exact location of bike path preserve and other improvements that are proposed by the County to be determined when the County is ready, and we have provided updates to Jody Galinato on that. With respect to Item No. 6, the Environmental Assessment and Park in-Lieu fees for Phase I have been paid based on the appraisal and that was on June 15, 2015. I'm also happy to answer any additional questions that you may have.

Chair Mahoney: Maybe because there is public concern and you were present during the testimony, is there anything you can do to enlighten the Commissioners and the public on the status?

Ms. Kuwaye: Sure. The Staff Planner is correct. Because of the substantial revisions that were made to our design plans back in November, we had to basically go back and revise things, and that caused a significant delay on redoing all of our plans. We are getting everything prepared right now. BMP Practices construction fences have been put up, basically to contain fences as required by law. We are beginning to get everything moving based on the plans that were approved by this Planning Commission in November. So, we are hoping that once the shoreline certification is set that we can go ahead and get our building permits and grading permits approved by the Department.

Just to let you know, we did submit a shoreline application this year and we are just waiting for the DLNR to set a date for site visit.

Chair Mahoney: Any questions for the applicant from any members of the Commission? Okay, at this time, the Chair will entertain a motion to receive the status report.

Mr. Abrams: Move to receive the status report for...

Mr. Katayama: Second. Oh, go ahead.

Mr. Abrams: The annual status report and the recommendation of Planning Staff; Coconut Beach Development, LLC.

Chair Mahoney: It's been moved and seconded. Any further discussion? Hearing none. All in...

Mr. Katayama: Excuse me. Mr. Chair, the testimony of the applicant updating certain conditions, is there a vehicle to add that to amend the status report to reflect those?

Chair Mahoney: It would be in the minutes.

Mr. Dahilig: Everything is on the record, so we would view that as part of the record and the report to the Commission.

Mr. Katayama: But no way to amend the report officially?

Mr. Dahilig: We could, if that's the pleasure of the Commission.

Mr. Katayama: Because these are, you know, to me, substantial progress payments and tangible. I think addressing some of the comments regarding the site work for good management practices should be reflected as well, so this does not conflict or have any issues with the need for a grading permit right at this point in time. Again, from a historical perspective, this has been a very unusual process, which is hopefully atypical. Again, generally for the record, but records get separated from the written testimony. I don't know what the vehicle would be.

Mr. Dahilig: I guess if the Commission were to direct that an excerpt of the minutes be attached to this report when it's filed, we can do that.

Mr. Katayama: Thank you.

Mr. Abrams: And I'd like to have that verified, also.

Mr. Dahilig: Yes.

Mr. Abrams: So at that point, what they say...you are going to need confirmation from those departments that they have...I mean, you didn't receive any evidence on a letter saying that these have been done, other than a verbal report, yeah?

Ms. Galinato: They can provide that to me and I'll keep it updated, and then we'll have another status report coming up soon.

Mr. Abrams: Yeah. And you can attach those to the report?

Mr. Smith: We'd be glad to provide copies of the evidence of the payments that we're talking about. We know that checks have been cashed. (Laughter in background) So we can provide that, and in addition, I believe that the various departments are well aware of it. You know, we talk with the departments all the time. This project is in the process of moving forward as quickly and expeditiously as we can, with respect to complying with every one of the conditions, and we will not do anything until we're there. We have an agreement and we are fulfilling our end.

Chair Mahoney: Okay, so we have to review this motion?

Mr. Dahilig: We work at the direction of the Commission, so if you'd like us to rollover these findings into the next status report, we can do that. We can take the minutes as an excerpt and

attach it directly to this report when it's filed, or we can draft a memorandum to the file that (inaudible) discussion today. We can do whatever you think is best to memorialize this.

Chair Mahoney: Is the Commission...

Mr. Katayama: Which would be the least painful way of memorializing this?

Mr. Dahilig: We could take the minutes as approved by the Commission and we'll follow through...

Mr. Katayama: That's fine.

Mr. Dahilig: We'll follow through and we'll attach it to the file.

Mr. Katayama: And may I ask another thing? For Condition No. 10, can we have a more definitive position on that internally?

Mr. Dahilig: Okay.

Mr. Katayama: Because it seems like the deadlines will be breached. Again, this is from a departmental and from a commission perspective that, you know, the Department has the flexibility to adjust.

Mr. Dahilig: Okay. We'll consult with the County Attorney's office.

Mr. Ho: Wayne, Condition No. 10, how much detail do you want?

Mr. Katayama: It's more of a legal process point of view. Do we need to go back to the courts? And if that's the case, you need to start earlier than later. If the Department has the ability to adjust it to reflect, you know, the approval of the shoreline, you know, and that becomes more administrative so they can handle it a lot quicker, more efficiently.

Mr. Dahilig: So I guess, maybe, knowing that we're out to December, I'll request an executive session with the Commissioners at the next available Commission meeting to get a temperature check whether engaging...how to engage the courts potentially with a certain position so we can get direction from the Commission privately and with the Attorney's office, in case that's something that wants to be entertained.

Ms. Higuchi-Sayegusa: Yes, no problem.

Mr. Katayama: Yes, thank you.

Chair Mahoney: So let's draw this back to the motion and second. So it's been moved and seconded, do we have to include...or just to accept the status report.

Ms. Nogami Streufert: Did we accept the status report as amended? Or...?

Mr. Dahilig: I think that was the motion.

Chair Mahoney: Could we restate the motion for clarity? Because I think at the beginning it was just to accept the status report, and then the discussion brought in the amended version, so if we could...

Mr. Abrams: So we'll withdraw to start. I withdraw my motion after the second.

Mr. Katayama: I withdraw my second.

Chair Mahoney: Okay, and the Chair will entertain a new motion.

Mr. Abrams: I make a motion to approve the amended status report for Coconut Beach Development, LLC to extend this timeline to December 9, 2016.

Mr. Katayama: Is that what we're doing?

Chair Mahoney: And you want to include...

Mr. Dahilig: We'll have them separately as an executive session; that other discussion.

Mr. Katayama: I thought we will take the status report and attach the minutes.

Mr. Abrams: Okay. To approve that and take the minutes and attach that to the approval for the extension.

Mr. Katayama: Second.

Chair Mahoney: It's been moved and seconded. All in favor? (Unanimous voice vote)
Opposed? (None) Motion carries 5:0. Thank you.

Ms. Kuwaye: Thank you very much.

Mr. Smith: Thank you very much.

Mr. Dahilig: Okay, Commissioners, we have the executive session that is on the agenda. This is for ZA...that is on the agenda for later on, but we posted this just in case there are legal questions. So we can take that on demand.

Mr. Abrams: I do have that request to go into executive session in regards to ZA-2016-3.

Mr. Dahilig: Okay.

Ms. Higuchi-Sayegusa: Do that now? Or...?

Mr. Dahilig: We can do that now or...it's up to the County Attorney.

Ms. Higuchi-Sayegusa: Either way. I mean, we could move on to the other matters and take that during lunch or something. That's fine.

Mr. Dahilig: The ZA is the last item on the agenda anyway.

Ms. Higuchi-Sayegusa: Right.

Mr. Abrams: Okay.

Chair Mahoney: Do you want to continue with the agenda then?

Mr. Abrams: Yes, we'll wait to the end of the agenda.

Chair Mahoney: Okay.

GENERAL BUSINESS MATTERS (Continued)

Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision by *Michael Levy & Alex Boilini Trust (Marjorie's Bed & Breakfast Inn)*, related to the Notice of Violation and Order to Pay Fines related to Use Permit U-2015-20, Special Permit SP-2015-5 and Class IV Zoning Permit Z-IV-2015-21, Tax Map Key (4) 2-6-1: 92, Lāwa'i, Kaua'i, to a Hearings Officer (Contested Case No. CC-2016-1); Request for Delegation of Authority to the Clerk of the Commission to Procure and Appoint a Hearings Officer on Behalf of the Commission for the Instant Appeal.

Mr. Dahilig: We are on Item I.1. This is the Clerk of the Commission's recommendation to refer an appeal of the Planning Director's decision by Michael Levy and Alex Boilini Trust (Marjorie's Bed & Breakfast Inn), related to the Notice of Violation and Order to Pay Fines related to Use Permit U-2015-20, Special Permit SP-2015-5, and Class IV Zoning Permit Z-IV-2015-21, Tax Map Key (4) 2-6-1: 92, this is in Lāwa'i, Kaua'i, to a Hearings Officer (Contested Case Hearing No. CC-2016-1); request for delegation of authority to the Clerk of the Commission and procure and appoint a Hearings Officer on behalf of the Commission for the instant appeal.

Mr. Chair, the Clerk does recommend that the appeal be received by the Planning Commission and then be referred to the Hearings Officer.

Chair Mahoney: Chair will entertain...

Mr. Dahilig: I believe that the appellant is in the audience and may want to state a position on this.

Chair Mahoney: Is the applicant's representative available? Could you state your name for the record, please?

Alexis Boilini: My name is Alexis Boilini. I'm the owner of Marjorie's Kaua'i Inn Bed & Breakfast. My husband is not here yet. I've been waiting for him. He was caught in traffic, but I'm going to try to proceed. I do have written testimony and evidence for you today to enter into the record, but it would be too long to read that statement, so I assume its good enough to just enter it and you will read it, correct? Because...do I only have three (3) minutes? Or do I actually have time to...?

Mr. Dahilig: Well, this is not the evidentiary portion. You are asking for a Contested Case Hearing.

Ms. Boilini: Okay. Alright.

Mr. Dahilig: The procedure is to, from a date standpoint, receive your appeal, and then refer it over to the Hearings Officer which will then handle the evidentiary portion of the hearing.

Ms. Boilini: Okay.

Mr. Dahilig: So all the evidence that you have at that point will be presented before that Hearings Officer when your case is called.

Ms. Boilini: Okay. So then can I make a statement of the timeline of this whole thing? Yeah? Can I have Bill just...?

Chair Mahoney: You know, you can have your three (3) minutes, but you know, just to let you know, this isn't the...like we said before, the evidentiary portion. It's just to receive the request to turn it over to a Hearings Officer to approve that; that's what...

Ms. Boilini: So this can't be entered in?

Chair Mahoney: No. Not today, no.

Ms. Boilini: Okay. Well, I'd like to make a statement, and then I was wondering if Bill could...

Chair Mahoney: Why don't you testify on just your portion, right?

Ms. Boilini: Okay. Alright. I will just...I'll just give you three (3) minutes.

Chair Mahoney: Yeah.

Ms. Boilini: Okay.

Ms. Higuchi-Sayegusa: Again, the action before the Commission is whether or not to refer the case, the appeal, to a Hearings Officer. And so, you know, if we're getting into any substantive issues of the case itself, I would keep that for the Hearings Officer, should the Commission decide to defer it.

Ms. Boilini: Okay then I'm going to just turn this over for a minute to Bill.

Ms. Higuchi-Sayegusa: Okay, but if you have any comments as to...

Ms. Boilini: I do.

Ms. Higuchi-Sayegusa: Whether you...you know, the preference whether or not you agree or not with referring it to the Hearings Officer. Those are the types of comments that are relevant.

Ms. Boilini: Yeah, I can make those comments, but can I have Bill say something first?

Ms. Higuchi-Sayegusa: Sure.

Ms. Boilini: Okay, thank you.

Bill Cowern: These comments would apply to both the first two (2)...

Chair Mahoney: Could you state your name for the record, please?

Mr. Cowern: I'm sorry. Bill Cowern. Lāwa'i.

Chair Mahoney: Thank you.

Mr. Cowern: We are concerned about the lack of due process here, in terms of there was not sufficient notice given to the parties for this hearing, and therefore, we did not have time to prepare and even understand what it is that we were supposed to be either objecting or not objecting to in this matter. As a matter of fact, the first time we had any knowledge whatsoever that it was proposed to be put forward to a Hearings Officer was the first time it appeared on the County Clerk's agenda.

Ms. Higuchi-Sayegusa: I'm sorry. Sir, I think your matter is number...the next item on the agenda.

Mr. Cowern: And I'm working for her as well.

Ms. Higuchi-Sayegusa: Okay.

Mr. Cowern: The same issue is in place for the Levy/Boilini case.

Ms. Higuchi-Sayegusa: Okay. So again, this is not the hearing itself. It's just whether the Commission wants to delegate it's authority to, you know, conduct the evidentiary...the Contested Case by the body or to appoint a Hearings Officer to go through the whole Contested Case process, so no substantive issues are going to be discussed at this point.

Mr. Cowern: I don't believe this is substantive. This is process, right?

Ms. Higuchi-Sayegusa: Yes.

Mr. Cowern: You either can or cannot proceed with something that you've put on an agenda if you haven't given proper notice.

Ms. Higuchi-Sayegusa: Yeah, but again, and having it go to a Contested Case...

Mr. Cowern: I mean, if you are saying it doesn't matter...

Ms. Higuchi-Sayegusa: Having it go to a Contested Case, you know, is...that process is more of a formalized process. It gives both parties...it's not an informal process. It allows both parties the ability to prepare and present evidence and prepare witnesses and testimonies in an organized manner and through a formalized process. So it is a process that will protect (inaudible).

Mr. Cowern: So you are saying the parties have no say whatsoever in whether or not that happens?

Mr. Dahilig: The decision that is up today is (1) to receive it per the Rules of Practice and Procedure of the Planning Commission, and (2) how to handle setting this thing for the due process hearing. So in terms of the due process that you are referring to, Sir, this is the start of that process to figure out how to provide you due process. This is not the due process hearing itself. So what is being handled by the Planning Commission at this juncture is (1) they have to receive it within a certain amount of time to allow you prudent disposition of your appeal and review whether or not its meeting to form and character as prescribed by the Rules of Practice and Procedure of the Planning Commission. Afterwards, the Planning Commission has a decision whether or not to refer it to a Hearings Officer or set itself for a hearing date. That, at that juncture, is when your due process, as required under law and the Constitution of the United States, is provided to you as a landowner.

Mr. Cowern: So your position then, I just want to be clear, is that you can take the action that you are taking today whether or not we received proper notice?

Mr. Dahilig: The notice that is provided is provided pursuant to HRS 92. When you have the actual hearing that will be provided via a separate notice.

Mr. Cowern: You didn't answer my question.

Mr. Dahilig: I just answered your question, Sir. Notice was provided to you pursuant to Hawai'i Revised Statutes Section 92.

Mr. Cowern: Not proper notice. Not enough notice.

Mr. Dahilig: It's legal notice. Whether you believe its proper or not, it's legal.

Mr. Cowern: We did not get fifteen (15) days' notice; that's what I'm saying.

Mr. Dahilig: Fifteen (15) days' notice is when you are provided notice of when the Planning Commission will hold its Contested Case Hearing; that is what it is. This is not the Contested Case Hearing.

Mr. Cowern: And you agree from a legal standpoint that that is...?

Ms. Higuchi-Sayegusa: Yeah, and so to explain, 92 is the Sunshine Law, which provides the public, you know, notice on any item that the Commission is going to be deciding. So, you know, by way of the agenda and any materials that were available for inspection, I mean, that's, at this point, it's not...hasn't been initiated to the Contested Case process, which requires a different type of notice with different standards. And the Contested Case process, again, is that due process procedure afforded to you, as well as the Department. So at this point, it's still with the Commission whether or not to, and how and when to initiate the formalized Contested Case process where you will be able to, you know, present your evidence, testify, present witnesses, etc. to contest the appeal, the substance of the appeal itself. So this proceeding is merely to decide on what's...how to initiate that process; i.e. whether it's going to be handled by the Commission itself and when, or whether to refer it to a Hearings Officer who will provide you that process.

Mr. Cowern: Yeah, and my question is that the parties have no say in that matter?

Ms. Higuchi-Sayegusa: And that's why you are able to speak at this point, whether or not...

Mr. Cowern: But again, we didn't have enough notice to prepare to speak on that issue.

Mr. Dahilig: And the issue is?

Mr. Cowern: The issue is whether or not this should go to a Hearings Officer.

Mr. Dahilig: Okay.

Chair Mahoney: Well, I think what's getting lost here a little bit is your understanding and maybe our presentation because this is like the beginning of the beginning in a way. So this isn't about... Notice was given, so obviously you're here, right?

Mr. Cowern: You are or you are not going to make a decision as to whether or not to go to a Hearings Officer with this, right? And it's my understanding we have a right to discuss that with the Commission, right? We did not receive proper notice to be sitting here to discuss that. We obviously got enough notice to know something was happening, but we didn't have enough notice to prepare. We didn't even know this was happening until four (4) days ago, in terms of the Hearings Officer.

Chair Mahoney: Could you explain it, our County Attorney, explain it in simple terms?
(Inaudible)

Mr. Cowern: I'm really objecting. If you guys find that we don't have any rights here, in terms of this decision, then that's what you find, you know, but...

Chair Mahoney: I think that's a mischaracterization of what's going on.

Ms. Higuchi-Sayegusa: I guess it's up to the Commission at this point. If you folks are willing to maybe...we can defer this matter to afford the applicants more time to analyze whether or not...or what their position may be as to the request of the Department to refer to the Hearings Officer, then you know, that's up to the Commission.

Ms. Nogami Streufert: Could I ask a question, then? Is there a requirement or a timeline as to what is considered to be appropriate prior notification? I think that's what the situation is right now. You are saying you don't have enough. Is there one? Or is this something that's more flexible? Not sure.

Ms. Higuchi-Sayegusa: Well, as far as any standards under law, you know, Chapter 92 HRS is there to ensure that the public at-large is notified of any action that is up for decision by any of the Boards and Commissions throughout the State.

Mr. Cowern: The Rules and Regulations of the Planning Commission say fifteen (15) days.

Ms. Higuchi-Sayegusa: Once it's initiated to the Contested Case process.

Mr. Cowern: It says parties to a hearing, right?

Ms. Higuchi-Sayegusa: Again, there was...as you may know from the agenda packet, there was a lot of back and forth as to the violation. There was a notice of violation in the order that followed, and so you know, there...but again, there was some back and forth as to the underlying violations itself. I'm sorry, and so...

Mr. Katayama: Excuse me, Jodi. I guess, you know, to help us, there are three (3) pathways forward, right? At this juncture. One is once a notice of violation is served, they can cure it by meeting, solving, resolving whatever the violation is. The other path forward is a Contested Case Hearing at which we are at today.

Ms. Higuchi-Sayegusa: Yes.

Mr. Katayama: Now, the choices forward from there is they can either petition the Commission to be the Hearings Officer or to have a third party. It's clear the applicant, if they have a preference, could articulate that before the Commission, but at the end of the day, the Commission has the responsibility to determine which path they want to take in resolving a Contested Case.

Ms. Higuchi-Sayegusa: Yes.

Mr. Katayama: Now, in terms of the 15-day notification, that deals with moving forward after today where...

Ms. Higuchi-Sayegusa: Yes.

Mr. Cowern: That is not my understanding.

Mr. Katayama: Well, again, this is where the attorney needs to make that clarity for us, and if its within 91 or 92, you know, whatever rules that we are operating under for this notification, as long as we've complied with that, that is what's here before us today to decide on our agenda, I think.

Mr. Cowern: And the rules and regs of Chapter 6 Section 1-6-5 of your own rules and regulations states that the notice of agency hearing will be served upon all parties and persons on the mailing list for this purpose at their last recorded address at least fifteen (15) days prior to the agency hearing date. That did not happen.

Chair Mahoney: This isn't the agency hearing.

Mr. Cowern: It's not an agency hearing?

Chair Mahoney: It's not yet. It's to be set up.

Mr. Cowern: This is a public hearing?

Chair Mahoney: You can play with words all you want, but...

Mr. Cowern: Well you just did though, I mean, that's what I'm saying.

Mr. Dahilig: Mr. Chair, he is correct in stating that section, but it specifically says fifteen (15) days' notice before the agency hearing, and the agency hearing, as prescribed by the rules, is the due process hearing. This is a management issue in terms of how the Commission wants to handle an agency hearing. So under Section 1-9-4, it talks about Commission actions because this is an appeal of the Planning Director's decision to fine the appellants for allegedly being in violation of the law. Under Section 1-9-4 in cases where appeals are pursuant to provisions of the Comprehensive Zoning Ordinance, the Commission shall consider the same within sixty (60) days of the filing of the notice of appeal. In the cases where the Commission hears the matter, it must render a decision within thirty (30) days after the close of hearing. In the case where a Hearings Officer is appointed, the Commission must act on its recommendation within thirty (30) days after receipt of the Hearings Officer's recommendation. So what it says is that you have to consider, within sixty (60) days, what needs to happen, and it entertains a place where the Planning Commission can appoint a Hearings Officer to conduct that hearing. That appointment in and of itself is not a hearing. So when it receives the matter, we have to receive it within sixty (60) days; that is the rules. And so that's where the receipt of the item comes in and whether or not the Commission would want to appoint a Hearings Officer to dispose of this, under Section 1-9-4. And 1-9-4 prescribes to Section 6 procedure as a means of handling any

appeal of the Planning Director, which is the Contested Case Hearing Chapter. So this is, again, you are considering the appointment of a Hearings Officer. You are not considering hearing the case at this instant moment, and therefore, because of the rule that Mr. Cowern has cited under Section 1-6-5, I believe, it talks about the notice being fifteen (15) days before the agency hearing. The agency hearing does not discuss the practice of appointing a Hearings Officer. Rather that is, because this appeal is pursuant to Chapter 9, the Chapter 9 procedure is what is being handled here because of the appeal of the Director's decision to fine that appellants for allegedly violating the law.

Mr. Cowern: So what you are telling me is that what is happening today does not require notice?

Mr. Dahilig: What notice is required is under Chapter 92, which is six (6) days' notice in a public posting of actions that the Planning Commission is going to take. There's nothing that says in this particular notice that there is an agency hearing being conducted.

Mr. Cowern: And that's your position?

Mr. Dahilig: That is my position, Mr. Chair.

Mr. Cowern: No, no. I'm talking to the attorney.

Ms. Higuchi-Sayegusa: So, I mean, again, for the Commission, if you folks want to afford the applicant an opportunity to analyze and form a position on whether or not to forward the case to a Hearings Officer or to have it heard before this Commission, that's up to you folks.

Mr. Dahilig: And then I would also like to cite Chapter 6, Agency Hearing Procedures. It states, Section 1-6-1, the Presiding Officer, in all agency hearings before the Commission, the Chair, or one of the Commissioners, or a Hearings Officer duly appointed and designated shall preside at the hearing. So it entertains that a Hearings Officer is appointed before the agency hearing starts, and that's Section 1-6-9 in terms of determining who the Presiding Officer is at the agency hearing.

Mr. Abrams: Question for the attorney. So we receive, I mean, the notice of violation there, the decision of the Planning Director was made to the applicant. They, then, appealed that decision.

Ms. Higuchi-Sayegusa: Yes.

Mr. Abrams: And that is also contained in their letter, February 12th.

Ms. Higuchi-Sayegusa: Yes.

Mr. Abrams: And it is provided with that letter, back up in regards to whatever rationale they feel would be something relative to their reason to have it appealed.

Ms. Higuchi-Sayegusa: Yes.

Mr. Abrams: And our Planning Director is now asking us, do you want to hear this yourself or have a Hearings Officer? I don't know...I mean, we can't actually hear any of the evidence now because that's still...that would be in violation of the due process where we'd be hearing all of that right now, so we really are just really focusing in on whether we'd make this move. If we decide to wait, we will still have to make that decision and I'm not quite sure what the applicant could provide in terms of the relevance of having us hear it or a Hearings Officer hear it; that goes through the same process, right?

Ms. Higuchi-Sayegusa: Or perhaps even just like a 5-minute recess and then I can, you know, discuss with the applicants. Or just explain again what the Planning Director already testified to, or pointed out the rules, and I can talk with the applicants and then we can come back and go forward.

Chair Mahoney: Okay. (Inaudible) clarification.

Ms. Higuchi-Sayegusa: Maybe ten (10) minutes.

Chair Mahoney: Take a caption break.

The Commission recessed this portion of the meeting at 10:04 a.m.

The Commission reconvened this portion of the meeting at 10:27 a.m.

Chair Mahoney: Call the meeting back to order. Where we left off...

Mr. Dahilig: Mr. Chair, we are still on Item I.1.

Chair Mahoney: I.1. Okay, we are returning from the recess. At this time, you know, the Chair...this is not the evidentiary portion and we are going to restrict it to if you want to state your position for the record, but we are not going to go into evidentiary portions of anything, so if we could continue on that vein.

Ms. Boilini: Okay. I just want it known for the record that it still is my position that I receive proper notice and then we go into this after proper notice has been had because I'm a party to this agency hearing today.

Chair Mahoney: This is not an agency hearing.

Ms. Boilini: And I still believe that I should be afforded my right to have proper notice in order to speak before you, but you are not going to do that, so I just wanted it on record; that's all. Okay, so you are saying I can make a statement, then?

Ms. Higuchi-Sayegusa: Again, as to what's before the Commission; i.e. referring it to the Hearings Officer or having the Commission conduct the evidentiary hearing itself and setting it for that hearing.

Ms. Boilini: Okay. Alright. And stop me if I do it incorrectly, okay? Okay, sorry, I didn't bring my notes, so I'm going to do it by phone. I had my husband send my notes. Okay. March 2015, without a 60-day prior notice under Chapter 91, owners/operators of Bed and Breakfast and Homestays were sent cease and desist notices misidentifying us as an illegal TVR. Immediately (inaudible).

Mr. Dahilig: Mr. Chair, I wish to object. She is reading into the record.

Chair Mahoney: If you can understand, this is not the hearing. There's no evidence taken, it's not...and it's not...it's to protect your rights, not to infringe upon them.

Ms. Boilini: Really?

Chair Mahoney: Really. This is to set up a hearing.

Ms. Boilini: But it's been a year and...

Chair Mahoney: It's a procedure. This isn't...there is a time and place for it, and...

Ms. Boilini: But we've never been afforded that time or place.

Chair Mahoney: That is what we are here today for. To set up...

Ms. Boilini: But this started in 2015, March.

Chair Mahoney: Okay. This is to start...to get a hearing in place so you can present the evidence that you want to talk about, how you want to be represented, but we are not here to listen to evidence and take testimony about it.

Ms. Boilini: Okay, this isn't evidence. It's just a statement.

Chair Mahoney: Well, it certainly is.

Ms. Boilini: As a citizen, can I give a public testimony during that portion of the hearing today?

Chair Mahoney: You know...

Ms. Boilini: Of the meeting today that I've been called to.

Ms. Higuchi-Sayegusa: Again, because you are the applicant and you are the appellant, you know, I would...you are the appellant, so I would...any testimonies would be regarding your case, and so I would advise the Commission that that should be saved for the Contested Case.

Ms. Boilini: Okay, so I'm not afforded the right to ever speak on my behalf from March 2015 to today?

Mr. Dahilig: (Inaudible)

Ms. Higuchi-Sayegusa: During the Contested Case.

Ms. Boilini: Every time I have come in front of you, you have stopped us from moving forward and stating our positions.

Chair Mahoney: Well, excuse me, but there is a procedure set up. And if you can just try to understand, nobody is trying to limit your speech, but this is not the venue for it. The Contested Case would be the venue to air your grievances; not here. What we are trying to do is get to set up that venue so then you can come in and testify and air your grievances. This is not the procedure for it. This is just for us that we are obligated to go forward and set up this Contested Case Hearing, and that's what it is about. It's not to infringe upon you at all. And when the case is there, then you will...it's like if...

Ms. Boilini: But the language says I should be able to do that in a timely manner, and I just don't believe that it's been very timely if this all started in March, where we were misidentified as a TVR. And we've tried and tried to come in and talk to people to prove that we're not, and they know we're not, but we still keep getting...

Chair Mahoney: Well...okay, I'm going to have to...

Ms. Boilini: We still keep getting violations for illegal TVRs.

Chair Mahoney: Okay, we have to stop at some point.

Ms. Boilini: I see.

Chair Mahoney: And just...we have to go forward. The next procedure is a Contested Case Hearing. This isn't it. This isn't...so it's like if you had a traffic ticket and you got arraigned, and you want to contest that, you'd go...the case doesn't get heard that day. The case isn't being heard today.

Ms. Boilini: But they are usually heard in a timely fashion or something else, you know.

Chair Mahoney: You can use all the words you want, but right now, the procedure...if you can understand what we are here as a body to do today...is to set up a date where you can come in and present your case, and you can air all of your grievances and however you think you've been wronged; that is the place to do it. Not here because...

Ms. Boilini: Then why was I summoned here today? Why was I asked to come here today?

Chair Mahoney: I don't know that you were asked to come here.

Ms. Boilini: Yes, I was.

Chair Mahoney: Maybe you were notified that this was taking place.

Ms. Boilini: Well, I called into the Planning Department and Mike Laureta told me that I needed to come here on the 8th, and he said not to say too much because it was just a rubber stamp.

Chair Mahoney: Well, it's not a rubber stamp.

Ms. Boilini: I know, but I'm here because I was told...

Chair Mahoney: Okay.

Ms. Boilini: I was asked to come in front of you.

Chair Mahoney: Let's kind of get this together here. We're playing with words. If you want to state something without any evidentiary portion, you may. If not, I'm going to end your testimony and we are going to move forward.

Ms. Boilini: Okay, I just want to state that I would like to present my case in front of this body today or soon, and you know, I guess the determination is, I mean, the answer to that is from all of you. I mean, I've tried really hard to become compliant in any way that you've asked. We were the first ones to come in, you know, when we heard that there was a problem, and we've tried to work with the Planning Department to no avail. We are trying our best and I mean, that is our legal right to be able to stand before our accusers, and we just so far have not been able to do that.

Chair Mahoney: Okay. Thank you. That was perfect. Okay, now for...I think we need...a motion is order to receive.

Ms. Nogami Streufert: I so move.

Mr. Abrams: Wait, we have to decide...

Ms. Higuchi-Sayegusa: Yeah, so again, the action...or the decision before the Commission is whether to set it before a Hearings Officer or have it heard by you folks instead.

Ms. Nogami Streufert: And is it my understanding or we have a discussion before...

Chair Mahoney: No, there's got to be a motion first and...

Ms. Higuchi-Sayegusa: Yeah, and so just to clarify, it's either...the motion would be either to set it before a Hearings Officer, the Contested Case, or set the hearing before you folks.

Mr. Abrams: I'm going to make a motion to appoint a Hearings Officer to conduct a required Contested Case Hearing related to the above referenced appeal. Further, I request authority to procure and appoint a Hearings Officer on behalf of the Commission.

Mr. Katayama: Second.

Chair Mahoney: It's been moved and seconded. Any further discussion? Hearing none.

Mr. Abrams: Wait, wait, wait. I do.

Chair Mahoney: Okay.

Mr. Abrams: I think having a Hearings Officer is a good idea for this. The person will be coming in who can be able to hear all of the issues, including some of the ones that you may have here relative to the due process, and the Planning Department will have to provide their case. We will then, after the recommendation is made, review the entire case and either confirm or not confirm the Hearings Officer's recommendations, so I think that that's a lot of what I think is fair and good due process right now, which gives you two (2) levels, as opposed to just us hearing it, which we...with the schedule we have with everything else, these processes, the last time I was involved, went for several meetings that went for six (6) or seven (7) hours sometimes on some of these. So I think that would be the quickest way to get these matters resolved.

Chair Mahoney: Any further discussion? Call for a roll call vote, please.

Mr. Dahilig: Mr. Chair, the motion on the floor is to receive the appeal submitted by Michael Levy and Alex Boilini Trust at TMK: (4) 2-6-1: 92, and refer the matter to a Hearings Officer to conduct the agency hearing.

Vice Chair Abrams?

Mr. Abrams: Aye.

Mr. Dahilig: Commissioner Ho?

Mr. Ho: Aye.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Aye.

Mr. Dahilig: Commissioner Nogami Streufert?

Ms. Nogami Streufert: Aye.

Mr. Dahilig: Chair Mahoney?

Chair Mahoney: Aye.

Mr. Dahilig: Five (5) ayes, Mr. Chair.

Chair Mahoney: Motion carries 5:0.

Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision by William I. & Catherine Covern, related to the Notice of Violation and Order to Pay Fines related to Use Permit U-2015-25, Special Permit SP-2015-6 and Class IV Zoning Permit Z-IV-2015-26, Tax Map Key (4) 25002037, Lāwa'i, Kaua'i, to a Hearings Officer (Contested Case No. CC-2016-2); Request for Delegation of Authority to the Clerk of the Commission to Procure and Appoint a Hearings Officer on Behalf of the Commission for the Instant Appeal.

Mr. Dahilig: The next item, Mr. Chair, is Item I.2. Clerk of the Commission's recommendation to refer an appeal of the Planning Director's decision by William I. and Catherine Covern, related to the Notice of Violation and Order to Pay Fines related to Use Permit U-2015-25, Special Permit SP-2015-6, and Class IV Zoning Permit Z-IV-2015-26 at Tax Map Key (4) 25002037, Lāwa'i, Kaua'i, to Contested Case No. CC-2016-2; request for delegation of authority to the Clerk of the Commission to procure and appoint a Hearings officer on behalf of the Commission for the instant appeal.

Mr. Chair, the Department did receive this appeal of the Director's decision levy and fines, and the appellant has requested that he be afforded due process pursuant to Rule 9 and Rule 6 of the... Chapters 9 and Chapters 6 of the Rules of Practice and Procedure of the Commission.

Mr. Covern: I'll try to refrain from anything other than...

Chair Mahoney: Could you state your name for the record, please?

Mr. Covern: Bill Covern, Lāwa'i.

Chair Mahoney: Thank you.

Mr. Covern: We still feel that what's happening today is not within the flavor of the law. That there are decisions being made for which we are supposed to be allowed to give our thoughts and recommendations, and that in order to determine what those thoughts should be, we should have enough time or enough notice to contact an attorney or go to some books or, you know, do due process in terms of ourselves to determine what would be... what we would consider to be the best way to go. And we have not been afforded that opportunity, and so we still feel that this is in violation of the hearing notice of 91-9-5. Thank you.

Chair Mahoney: Thank you for your testimony. Okay, at this juncture, the Chair will entertain a motion.

Mr. Abrams: Mr. Chair, I move to approve the appointment of a Hearings Officer to conduct the required Contested Case Hearing related to the above referenced appeal that Contested Case No. CC-2016-2. Further, I request the Commission grant authority to procure and appoint a Hearings Officer on behalf of the Commission.

Ms. Nogami Streufert: Second.

Chair Mahoney: It's been moved and seconded. Any discussion?

Mr. Katayama: Chair Mahoney, since the appellant has questioned procedurally, is there a way we can get an opinion to codify what the process is, in terms of the various steps? And that way, moving forward, as we process other types of appeals, it can be sort of clearly stated.

Ms. Higuchi-Sayegusa: Okay.

Chair Mahoney: Would you like to amend it into the motion?

Mr. Katayama: No.

Chair Mahoney: Just as a...

Mr. Katayama: This is apart and this is more of a process question. I don't think this will stop any of the appellants from challenging our interpretation, but at least we have, on record, what our timelines are and if they are being met. Again, to clarify the language of "agency" versus "agenda items" before the Commission for action. I think, you know, it's clear in my mind what the steps are, but apparently the appellants are not, and so we need to, I think, formally have a position on that; what the Commission's position on that is or the Department's, either one.

Ms. Nogami Streufert: And in that same document, could there also be a statement as to what the intent of it is and what the potential decision points are and what those potential decisions could be?

Ms. Higuchi-Sayegusa: Sure.

Ms. Nogami Streufert: Because that might...I think that makes it clearer when people know what kinds of decisions are going to be made at what times, or at least what potential decisions could be made, then they can prepare for their testimony or whatever they would like to say. Thank you.

Chair Mahoney: Okay, so then we will redirect to the motion then.

Ms. Higuchi-Sayegusa: So noted. Or is the opinion request going to come from the Department? Or...?

Mr. Dahilig: We can definitely write up an opinion request. However, I would caution the Commissioners that if this is a public document that is meant for public information...

Mr. Katayama: It should be.

Mr. Dahilig: The Department would want to raise concerns with the Commissioners whether or not something like that would be interpreted as advice that is being given, and so...because the

rules are in black and white. And so if this is something that would be used as a tool to have the public rely on whether or not it is following the rules and it may not inform them fully of the full extent of what the rules of practice may entail and they may say okay, this wasn't on the checklist, then we could be held responsible and liable for providing advice that may infringe on their own rights. So we will send up the request, but I would...I may ask in a separate opinion concerning, you know, how we use that document for public review.

Mr. Katayama: Could it be in the form of a policy document?

Mr. Dahilig: We can incorporate...

Mr. Abrams: Like amend the rules?

Mr. Katayama: No.

Mr. Abrams: No?

Mr. Katayama: No. I think the law is stated on the process. I think what is subject to interpretation from what I'm hearing from the appellants is what the definition of an "agency hearing" is or, you know, what triggers what action. And I think that's where, sort of, ambiguity at least from the applicant's or the appellant's point of view. Again, from a Commissioner's point of view, I think it's quite clear; however, from today's testimony, apparently it's not. So any kind of help in clarifying that, I think, would be helpful. I'm sure that we are going to have more of these as we move forward with the other agenda items today, in terms of how we are recommending different changes to the Homestay Ordinance and things like that, so.

Ms. Higuchi-Sayegusa: I mean...again, as the Commission's attorney, I'm happy to clarify what the rules are and the interplay between Chapter 91 and Chapter 92, and I can issue an opinion to clarify that. It is with this decision whether or not to release it, but again, I do...

Mr. Katayama: We can handle it as client-attorney privilege.

Ms. Higuchi-Sayegusa: Yeah, and I do want to dovetail on Mr. Dahilig's concerns because, again, I am this body's attorney and you know, the rules are available for the public, as are the HRS.

Mr. Katayama: Okay.

Ms. Higuchi-Sayegusa: And they have the option, whether or not they want to consult with their own attorney.

Mr. Katayama: Fair enough. So we can treat it as client-attorney work product.

Ms. Higuchi-Sayegusa: Okay.

Mr. Dahilig: Given that, Mr. Chair, just on behalf of the Department, I just want to raise, for the record, that the Department, given Mr. Cowern's appearance today, is not waiving any defenses related to deficient notice given his appearance.

Chair Mahoney: Alright, so let's get back to the motion on the floor. There was a motion and a second, and discussion. Any further discussion? Hearing none. We'll call for a roll call vote, please.

Mr. Dahilig: Chair, the motion on the floor is to refer Contested Case No. CC-2016-2 and to appoint a Hearings Officer on behalf of the Commission for the instant appeal, and to allow procurement to be handled by the Clerk.

Vice Chair Abrams?

Mr. Abrams: Aye.

Mr. Dahilig: Commissioner Ho?

Mr. Ho: Aye.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Aye.

Mr. Dahilig: Commissioner Nogami Streufert?

Ms. Nogami Streufert: Aye.

Mr. Dahilig: Chair Mahoney?

Chair Mahoney: Aye.

Mr. Dahilig: Five (5) ayes, Mr. Chair.

Chair Mahoney: Motion carries 5:0. Thank you.

Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision by *Mohala Ke Ola Management*, related to the Notice of Violation and Order to Pay Fines related to Use Permit U-2015-14 and Class IV Zoning Permit Z-IV-2015-15, Tax Map Key (4) 42009011, Kapa'a, Kaua'i, to a Hearings Officer (Contested Case No. CC-2016-3); Request for Delegation of Authority to the Clerk of the Commission to Procure and Appoint a Hearings Officer on Behalf of the Commission for the Instant Appeal.

Mr. Dahilig: Next item, Mr. Chair, is Item I.3. Clerk of the Commission's recommendation to refer an appeal of the Planning Director's decision by *Mohala Ke Ola Management*, related to the Notice of Violation and Order to Pay Fines related to Use Permit U-2015-14 and Class IV

Zoning Permit Z-IV-2015-15 at Tax Map Key (4) 42009011 in Kapa‘a, Kaua‘i, to a Hearings Officer (Contested Case No. CC-2016-3); request for delegation of authority to the Clerk of the Commission to procure and appoint a Hearings Officer on behalf of the Commission for the instant appeal.

Mr. Chair, this appeal was received by the Planning Department and being forwarded to the Commission pursuant to the Rules of Practice and Procedure in Chapters 6 and 9 of this Commission.

Chair Mahoney: Representative for the applicant.

Jonathan Chun: Good morning. Jonathan Chun on behalf of Mohala Ke Ola. Thank you for receiving our appeal of this matter. We have no objections, as far as recommendation from the Department to refer this matter to a Hearings Officer. I just want to clarify two (2) matters, not argumentative, because as we progress...one is the order mentioned a person by the name of Patricia Enderlin and I believe in my response, Ms. Enderlin is no longer associated with Mohala Ke Ola, LLC. She is not a member of the LLC, she has not been a member of the LLC for at least two (2) years, she no longer lives on the island, and I just would request that she not be included as being in violation of any ordinance. The second point is, as we progress, I would hope that as part of this proceedings that Mohala would be advised as to the time, place and manner in which it is believed...the County believes that they were violating the ordinance. Again, using the analogy of a traffic ticket, when you get the traffic ticket, you are told specifically the date, time, place, and the officer who actually observed your speeding or parking. So we would assume that as we progress as a Contested Case Hearing that that kind of details will be flushed out for the applicant. But we have no objections, as far as a referral to the Hearings Officer.

Chair Mahoney: Thank you.

Mr. Dahilig: And just to answer Mr. Chun’s question, given his request, we will gladly provide that information.

Chair Mahoney: Any questions for the applicant? No? Okay, hearing none. Thank you.

Mr. Abrams: Mr. Chair, I make a motion to approve the appointment of a Hearings Officer to conduct the required Contested Case Hearing related to the above referenced appeal, No. CC-2016-3, and to procure and appoint a Hearings Officer on behalf of the Commission.

Ms. Nogami Streufert: Second.

Chair Mahoney: It’s been moved and seconded. Any discussion? Hearing none. We’ll call for a roll call on this, too.

Mr. Dahilig: Mr. Chair, the motion on the floor is to refer Contested Case No. CC-2016-3 to a Hearings Officer and allow the Clerk of the Commission to procure and appoint that Hearings Officer.

Vice Chair Abrams?

Mr. Abrams: Aye.

Mr. Dahilig: Commissioner Ho?

Mr. Ho: Aye.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Aye.

Mr. Dahilig: Commissioner Nogami Streufert?

Ms. Nogami Streufert: Aye.

Mr. Dahilig: Chair Mahoney?

Chair Mahoney: Aye.

Mr. Dahilig: Five (5) ayes, Mr. Chair.

Chair Mahoney: Motion carries 5:0.

Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision by Jonathan Chun, Esq., representing John & Shannon Wark, related to the Notice of Forfeiture of Non-Conforming Use Certificate TVNCU#4219 ('Anini Kai) related to Special Permit SP-2011-13, Tax Map Key (4) 5-3-04:29, 'Anini, Kaua'i, to a Hearings Officer (Contested Case No. CC-2016-5); Request for Delegation of Authority to the Clerk of the Commission to Procure and Appoint a Hearings Officer on Behalf of the Commission for the Instant Appeal.

Mr. Dahilig: Next item on the agenda is Item I.4. Clerk of the Commission's recommendation to refer an instant appeal of the Planning Director's decision by Jonathan Chun, Esq., representing John and Shannon Wark, related to the Notice of Forfeiture of Non-Conforming Use Certificate TVNCU#4219 ('Anini Kai) related to Special Permit SP-2011-13, Tax Map Key (4) 5-3-04:29 at 'Anini, Kaua'i to a Hearings Officer (Contested Case No. CC-2016-5), and there's a request for delegation of authority to the Clerk of the Commission to procure and appoint the Hearings Officer on behalf of the Commission for the instant appeal. The appeal has been received by the Department and is being referred to the Planning Commission for its disposition.

Mr. Chun: Good morning. Jonathan Chun on behalf of the Wark's. Thank you for receiving our petition for appeal. We have no objections, as far as a referral of the matter to a Hearings Officer.

Chair Mahoney: Thank you. Chair will entertain a motion.

Mr. Abrams: Mr. Chair, I make a motion to approve the appointment of a Hearings Officer to conduct the required Contested Case Hearing related to the above referenced appeal, No. CC-2016-4. Further, to give the Clerk the authority to procure and appoint a Hearings Officer on behalf of the Commission.

Ms. Nogami Streufert: Second.

Chair Mahoney: It's been moved and seconded. Any discussion? Hearing none. Do a roll call on this also, please.

Mr. Dahilig: The motion on the floor is to set for hearing Contested Case No. CC-2016-5 and delegate authority to the Clerk of the Commission to procure and appoint a Hearings Officer on behalf of the Commission for the instant appeal.

Vice Chair Abrams?

Mr. Abrams: Aye.

Mr. Dahilig: Commissioner Ho?

Mr. Ho: Aye.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Aye.

Mr. Dahilig: Commissioner Nogami Streufert?

Ms. Nogami Streufert: Aye.

Mr. Dahilig: Chair Mahoney?

Chair Mahoney: Aye.

Mr. Dahilig: Five (5) ayes, Mr. Chair.

Chair Mahoney: Motion carries 5:0.

Clerk of the Commission's Recommendation to Refer an Appeal of the Planning Director's Decision by Jonathan Chun, Esq., representing Michael Chandler, related to the Notice of Forfeiture of Non-Conforming Use Certificate TVNCU#4222 (Hale O Lalani) related to Special Permit SP-2012-1, Tax Map Key (4) 5-3-03:45, Kilauea, Kaua'i, to a Hearings Officer (Contested Case No. CC-2016-4); Request for Delegation of Authority to the Clerk of the

Commission to Procure and Appoint a Hearings Officer on Behalf of the Commission for the Instant Appeal.

Mr. Dahilig: Next item, Mr. Chair, is Item I.5. Clerk of the Commission's recommendation to refer an appeal of the Planning Director's decision by Jonathan Chun, Esq., representing Michael Chandler, related to the Notice of Forfeiture of Non-Conforming Use Certificate TVNCU#4222 (Hale O Lalani) related to Special Permit SP-2012-1, Tax Map Key (4) 5-3-03 Parcel 45 in Kīlauea, Kauaʻi, to a Hearings Officer (Contested Case No. CC-2016-4), and request for delegation of authority to the Clerk of the Commission to procure and appoint a Hearings Officer on behalf of the Commission for an instant appeal.

Mr. Chair, the appeal has been received by the Planning Department and is being referred to you for your disposition.

Mr. Chun: Good morning. Jonathan Chun on behalf of the appellant. We have no objection as to referring of the matter to a Hearings Officer, and we thank you for accepting our petition for appeal.

Chair Mahoney: Thank you. Chair will entertain a motion.

Mr. Abrams: Mr. Chair, I recommend approval to appoint a Hearings Officer to conduct the required Contested Case Hearing related to the above referenced appeal, No. CC-2016-4. Further, to give the Clerk the authority to procure and appoint a Hearings Officer on behalf of the Commission.

Ms. Nogami Streufert: Second.

Chair Mahoney: It's been moved and seconded. Any further discussion? Hearing none. We'll do a roll call on this.

Mr. Dahilig: Vice Chair Abrams?

Mr. Abrams: Aye.

Mr. Dahilig: Commissioner Ho?

Mr. Ho: Aye.

Mr. Dahilig: Commissioner Katayama?

Mr. Katayama: Aye.

Mr. Dahilig: Commissioner Nogami Streufert?

Ms. Nogami Streufert: Aye.

Mr. Dahilig: Chair Mahoney?

Chair Mahoney: Aye.

Mr. Dahilig: Five (5) ayes, Mr. Chair.

Chair Mahoney: Motion carries 5:0.

Request to eliminate Condition No. 4 of Project Development Use Permit PDU-2012-1, Class IV Zoning Permit Z-IV-2012-7, Use Permit U-2012-7 and Variance Permit V-2012-5, Tax Map Key 5-2-023:027 & 028, Kīlauea, Kaua‘i = Kīlauea Ventures, LLC.

Mr. Dahilig: Okay. We are now on Item I.7. Request to eliminate Condition No. 4 of Project Development Use Permit PDU-2012-1, Class IV Zoning Permit Z-IV-2012-7, Use Permit U-2012-7, and Variance Permit V-2012-5 at Tax Map Key 5-2-023 Parcels 027 and 028, Kīlauea, Kaua‘i. This is Kīlauea Ventures, LLC, and Dale Cua is the Planner for this particular item.

Chair Mahoney: Okay, thank you.

Staff Planner Dale Cua: Good morning, Mr. Chair and members of the Commission. I’m going to move on to the background of the project.

The subject permits involve the development of a shopping center to serve the commercial needs of Kīlauea Town, as well as residences of the north shore. As originally represented, the development involves construction of ten (10) separate structures encompassing approximately 46,800 square feet of commercial space. The development was intended to provide accommodation for a market, hardware store, auto parts store, drugstore/pharmacy, bank, health clinic, small food establishments, and professional offices. In addition, the development includes the construction of interior driveways, off-street parking, and a large capacity wastewater treatment system.

Applicant’s request. In accordance with Condition No. 4 of the foregoing permits, the applicant is requesting to remove this requirement as a condition. Condition No. 4 presently reads as follows: “The Applicant shall integrate four (4) multi-family dwelling units as “loft-style” housing above the commercial space fronting the proposed bypass road, and will be part of the commercial project...” As represented in their correspondence dated February 17, 2016, the applicant is unable to facilitate and provide the wastewater needs of the entire commercial project, as well as to allow for integration of these multi-family residential units. Since there is no sewer system available in the area, the wastewater generated by the project is being served by several septic systems.

The Department’s evaluation is contained in the report. I’m just going to move on to Paragraph 4 of the evaluation. In recognition of the mixed zoning of the project site, the Department initially requested the integration of four (4) housing units into the project as an example of mixed-use development and “live-work-play” lifestyle, which is a component of “Smart Growth” principles. These residential units were considered as “loft-style” housing above the commercial

office space, and integrated as part of the commercial project. The Department worked closely with the County Department of Water to guarantee water for these residential units and they've agreed to support this pilot mixed-use development program with some reservations. The Department would like to emphasize that the provision of these residential units was not a requirement of the County Housing Agency, but rather intended to serve as a pilot program for mixed-use development. While it is admirable that the applicant was willing to participate, it was not the Department's intentions to cause any delays or impede progress with the development. There will be further opportunities to explore this program with upcoming developments on the island in other communities.

Recommendation. Based on the foregoing, it is recommended that the Commission approves the applicant's request to delete Condition No. 4 of the subject permits.

And that concludes the Director's Report.

Chair Mahoney: Thank you. Are there any questions for...? Is the applicant present? Could you state your name for the record, please?

Lorna Nishimitsu: Good morning, Commissioners. For the record, Lorna Nishimitsu on behalf of Kīlauea Ventures. I'm accompanied by Steve Colón who's one of the principles of Kīlauea Ventures, and we've also brought in our wastewater consultant, Jonathan Nagato, in the event the Commission has any questions.

When we applied for the permits to develop this parcel in the Kīlauea Town Core, it was presented as a purely commercial project. There is a small section of land that is zoned Residential R-6, but it was to the Hanalei side of the property, kind of tucked away with a very narrow access into that area. And reviewing the potential of the property, it seemed that all commercial would be appropriate. On June 26, 2012 when the Commission approved the project, it was with the pilot project of, you know, four (4) "loft-style" units, residence above the commercial space fronting what will become the Kīlauea Post Office Road. I guess there has been some success with this kind of development in the Kapolei area of O'ahu.

There was one (1) comment in the Staff Report that suggested that in the four (4) years that have been intervening, the developer has done very little. I'd like to take issue with that. I explained to Dale that in that 4-year period, we were required to go back to the Planning Commission to take care of a condition imposed on the developer of the Post Office project that had been unfulfilled for decades, and that was to develop the Kīlauea Post Office Road, so we had to go in and do a consolidation, resubdivision, and then design. We've gone through several steps of the design process with Public Works, so it wasn't that nothing was being done, it was all being done behind the scenes. It didn't involve earth movement. And of course, the design of the buildings, the design of the infrastructure, the design of improvements to Kīlauea Lighthouse Road, all of those have been ongoing, so there's been a lot of work that has been ongoing, including the design of the wastewater system, which has...is what essentially has caused this little...caused us to come to a screeching halt at this point. Wastewater design is based on fixture count. Because of the four (4) dwelling units that were conditions of approval, the fixture count requires that there be more land area allocated...more wastewater septic systems allocated,

more land area that's going to be taken up, in addition to us servicing the public restrooms that we want to develop and the restaurants. The commercial spaces in and of themselves, which usually don't have fixtures, you know, they are fine, but this is what caused our wastewater consultant to have concerns, and it was this that prompted us to come before you to ask if you would remove the condition to do "loft-style" or "live-work" units for this property. The other thing is the realtors have been assessing the viability of this kind of project on the island of Kaua'i, and yes, we are different from O'ahu. The concept hasn't yet quite caught on and there doesn't seem to be a whole lot of interest in this kind of facility, which may be appropriate as it was in the old days in Kapa'a Town when grandparents had their barber shops and lived upstairs, and the old restaurants like Tropical Diner when owners lived upstairs, so there are areas, I believe, on Kaua'i that would be appropriate, but it's not penciling out for this particular developer especially since the wastewater conditions of Old Kapa'a Town in the 50's and the 40's are certainly far different from that which is required now. There is also the old O'Connor Building Project, which they found out it is serviced by a cesspool, which is going to have to be upgraded, which means that more land area has to be allocated to take care of all these wastewater needs.

I think Steve is probably better suited to explain if this Commission needs to have some assurance that we haven't been sitting on our thumbs for four (4) years. And certainly Mr. Nagato is the technical person who can explain the intricacies of what I thought would be simply to dig holes in the ground to take care of wastewater; it's not as simple as a layperson, like myself, thinks. Thank you for your listening.

Chair Mahoney: Thank you. Any questions from any member of the Commission to the applicant?

Mr. Abrams: Yes. Steve, the units...split-level, I mean, mixed-use, I guess at that point, was that intended initially to be a CPR where you would buy it or lease it?

Steve Colón: No. It was actually designed as a single-unit with this commercial space below, and then you walk upstairs to your apartment above.

Mr. Abrams: Uh huh. And so it was designed that way, so was it...did you intend to sell that or lease it?

Mr. Colón: Lease it.

Mr. Abrams: Lease it. Okay.

Mr. Colón: In marketing it, what we found was these are small spaces; these are 800-square foot spaces. And the tenants we were going after, there was just no interest for somebody in leasing out an 800-square foot unit below and then upstairs having a 1-, 2-, or 3-bedroom apartment.

Mr. Abrams: Okay. Let's see. So, being at a non-sewered area, which is now, I guess, maybe more my question would be directed to your wastewater consultant, that form of septic tanks as a way you have that set up and leech fields that allow you to do those individuals ones, or four (4)

of them, or actually more, that compared to the cost of some other system that might be feasible, or not. Could you give us an idea as to why you got to just that? Because sometimes I hear, relative to wastewater systems, you can get them fairly compact and do things that don't require so much space. I don't know what the prices are or what, or whether that it makes it feasible, but I would appreciate to hear about that.

Mr. Katayama: Commissioner Abrams, can I kind of, sort of, tack on to that since...

Mr. Abrams: Yeah.

Mr. Katayama: Jon, based on, you know, your recommendation or the recommendation of the applicant to remove the four (4) units, does that mean that based on the site plan that you have submitted, that that is the maximum buildout of this project due to the wastewater generation? That you've maximized the capacity of wastewater being generated from this development.

Jonathan Nagato: Which question should I answer first?

Mr. Katayama: It's sort of the same question.

Mr. Abrams: Have at it. You can go either direction, yeah.

Mr. Nagato: Okay. Jonathan Nagato. When we were first brought into the project, for projects of this size, individual wastewater systems, as they are defined in the State of Hawai'i, are one of your options and the other option would be what we call the wastewater treatment plant or wastewater treatment works if you are not provided a sewer connection by municipality or county. For this project, there was no County sewer available so our two (2) options, obviously like you are stating, is the individual wastewater systems or the wastewater treatment plant. Not even getting into...there is a significant initial investment for a wastewater treatment plant being much higher, but as far as engineering standpoint, we start with the individual wastewater systems because for the size and for the estimated flow way back when we started, it was more appropriate based on the size of the shopping center, so that's how we got into it. The restrictiveness of the development from the wastewater standpoint is based on Department of Health's Wastewater Branch State of Hawai'i Chapter 62 Rules. Physically, there is enough space for septic tanks, leech field disposal; however, in the rules for a commercial property, they must show 10,000 square feet of net usable land for each individual wastewater system. That net usable land is the gross land area minus the commercial buildings footprint, so it's kind of a moving target. As you add more buildings to the lot, your net usable space becomes less and less, so that was kind of the balance between what the client or the developer wanted to buildout with, and then trying to balance that with what they are allowed by the State Department of Health.

Mr. Katayama: I guess what I'm asking is that in your request, you are saying that currently, you cannot accommodate the wastewater flow for these four (4) units, so therefore, removing them would help the project move forward. Saying it another way is that, is that a cap to how much...based on the site plan you've submitted, the applicant has submitted, are you capped at the additional, either people traffic or development that will generate additional wastewater? In

other words, if you were to complete the...follow the site plan as presented, what kind of surplus capacity would you have for wastewater?

Mr. Colón: There's no...nothing.

Mr. Katayama: So this is it, then?

Mr. Colón: Yes.

Mr. Katayama: So for a visitor traffic flow and for a development flow, this is it?

Mr. Colón: Yes. My name's Steve Colón. Let me...I'd like to highlight a few things and then I'm happy...since we brought Jon over here, please ask him questions. I'm not going to profess to being a wastewater treatment expert.

This has been a very long process for us; these last four (4) or so, three and a half (3 ½) years. And I liken this to a game called "whack-a-mole", where as soon as you solve some problem on this side, something pops up the other side, so we think we've got this taken care of and then there's another issue that comes up. So we've been sequentially working through a lot of typical type of development issues that one has to work through. Lorna highlighted that Post Office Road. I do want the Commission to be aware that our taking on that obligation and responsibility to improve that Post Office Road, which the previous...which the Post Office owner never did, is that has been a whole process in itself because of changing road standards, changing road widths, how that impacted the adjoining landowner, so I'll just leave it to say that it's been a very lengthy process that was not concluded until very, very recently.

Similarly, and what we are really here for today, is these wastewater challenges. We originally wanted to do something called "constructed wetlands", which is more of...kind of a natural pond. From what I understand, it was a lot of vegetation that grows in and kind of naturally treats things. Well, minor problem, there are a lot of birds in that area, and if you have something like that, you are going to attract a lot of birds there, so that took that off the table besides the fact that it needed a lot of room. We looked, also, extensively at the wastewater treatment issue, and that was also something that was going to require a lot of land. In consultation with Jon, from an engineering standpoint, and again, I'll let him discuss that in greater detail, but the size of this center at 48,000 or 49,000 square feet and the wastewater that that will generate is...fits very well within the parameters, the engineering design parameters, for a septic tank system, which is why we decided to go this route. Now, you know, to answer Commissioner Katayama's question, this does absolutely max us out, but like in so many other situations like this where you want a direct answer and I want to give you a direct answer, you always have this "it depends." And what I mean by that is well, you know, maybe we could accommodate those four (4) apartments, but if we do that, there's no restaurants, there's no public restrooms. This whole area has no public restrooms anywhere, and our shopping center is going to be providing very, very much needed public restrooms, right? So it's all a...and I've, like I said, I've gotten more into this than I ever thought I would, the nuances of how the wastewater calculations work, but they are based on the type of tenant you have. So if we want to have restaurants and the community was very, very vocal with us, you know, wanting to have

food users over there, then you have to...they use a lot of wastewater. And then you get into is it a sit-down restaurant or is it a take-out only restaurant? You know, are they going to have bathrooms in there or not? And that's why I say it's a series of calculations that Jon has done, and that has led us to a very difficult decision to come before you and that was that we basically concluded was the only way we could do this would be...the only way we could have a project that would have an adequate number of food users... Fewer than we promised the community, I might add. Less. This is not our ideal solution. The only way we could get to where we are at today would be through elimination of that building in the back.

Chair Mahoney: Thank you. Any other questions? Commissioner Ho.

Mr. Ho: On this site plan, where is the leech field that runs...?

Mr. Nagato: I don't know. I'm not sure (inaudible).

Mr. Colón: You're looking at the site plan. We have a wastewater treatment plan that shows...

Mr. Nagato: Yeah. It's not actually drawn on. It's underground. It's on the parking...I guess the road, the parking... It has to be underground. It can't be under the building, so I had to find space that's not under the building.

Mr. Abrams: So you are using the driveway, shall we say, to access the project and all the retail stores?

Mr. Nagato: Yeah, it's under the parking lot, under the roadway.

Mr. Abrams: What's going to happen to this area here, then, that would not become residential? Would it just go all retail, then?

Mr. Colón: Right now it's just parking. If there would be a structure there, it would just be a...it would have to be what we call a "dry building", so it would have to be all retail with no water, no outlet.

Mr. Abrams: I see.

Mr. Ho: Do you throw restaurant waste and bathroom waste together in the same system?

Mr. Nagato: The septic tank does treat both, yes; however, you have to separate the plumbing prior to have a grease interceptor for restaurants, so it has dual plumbing coming out of the building and then coming back together.

Chair Mahoney: Any further questions?

Ms. Nogami Streufert: Just a question. Does that mean that the building will still be built, but it will have no living residential lofts? Or does it mean that you are not building that building at all?

Mr. Colón: As of right now, we have taken it out of the plans. Right now, we just have a parking lot there.

Ms. Nogami Streufert: But if that...if the lofts, residential lofts, were taken out of the plan, what would happen to that area?

Mr. Colón: Like I said, we're actually adding in sixteen (16) parking spaces right now.

Chair Mahoney: Any further questions?

Mr. Dahilig: Commission Chair, if I could just also add. Just to clarify, again, this is the Department of Health Wastewater Division, not our Wastewater Office here at the County, which handles the County wastewater systems, so this purely is, you know, by Department of Health rule that they're being squeezed. We have taken a look at it, as Dale has written in his report, and we think we've...we've come to the conclusion that Hunt and their team have given this the college try. Again, this was an exaction that we've asked them to try to look at from an experimental standpoint, from a pilot project standpoint, and we feel that they've given the best effort to try to make this happen. It's not the outcome we want, but it's the baby-and-bath-water syndrome situation here where we, you know, can see that this has reached that additional straw on the camel's back that if it is added, the rest of the project would collapse. And recalling back to the original hearings on this, I mean, this is providing a real critical need for the community, both from a commercial standpoint, as well as from a public facility standpoint, given the amount of traffic that does come in and out of there from the public, as well as from residents. So we think that there has been a good faith effort here to try to meet this condition.

Mr. Abrams: So gaining the use of two (2) individual wastewater systems, because you are not using residential, then would allow more restrooms, then, outside of that area? I'm not quite sure whether you have a central one, or you will allow an office or retail to have a restroom in it.

Mr. Colón: Well, we...our plan does have restrooms now. This will...this actually will allow us to not only have public restrooms in that side of the...the right side of the site plan that I believe has been supplied to you...but it will also allow for a restaurant use in the front building that without this, we would not be able to accommodate.

Mr. Abrams: Okay.

Chair Mahoney: Okay, the Chair will entertain a motion.

Mr. Abrams: I move that we approve Staff's recommendation to delete Condition No. 4 of the subject permits for Project Development Use Permit PDU-2012-1, Use Permit U-2012-7, Variance Permit V-2012-5, Class IV Zoning Permit Z-IV-2012-7, Kīlauea Ventures, LLC.

Mr. Katayama: Second.

Chair Mahoney: It's been moved and seconded. Any discussion? Hearing none. All in favor? (Unanimous voice vote) Opposed? (None) Motion carries 5:0.

Ms. Nishimitsu: Thank you.

Mr. Colón: Thank you.

Mr. Dahilig: Mr. Chair, the remaining items on the agenda are the executive session related to ZA-2016-3 and action related to ZA-2016-3. We are anticipating lunch to come around the 11:30 hour. It may be prudent to, maybe, take the lunch recess and go into executive session at the same time, and then, I guess, return to the public meeting at a time set.

Chair Mahoney: What time is good?

Ms. Higuchi-Sayegusa: Just depends on how long the discussion goes in exec., but I mean, my portion is probably very little. I mean, a lot of it could be had outside.

Mr. Abrams: Or would we open this up for discussion and then go into exec. or presentation?

Mr. Dahilig: It's at the Commission's pleasure.

Mr. Abrams: Does B.C. stay when we go into executive session?

Ms. Higuchi-Sayegusa: No.

Mr. Abrams: B.C. gets to go home?

Ms. Higuchi-Sayegusa: We can have a limited discussion in executive session, and then return to the open floor and have a more detailed discussion, aside from any legal issues relating to this (inaudible).

Mr. Abrams: Okay. Alright, let's do that. You're going to have to go to lunch and then come back.

B.C.: What time?

Ms. Higuchi-Sayegusa: 12:30?

Chair Mahoney: 12:30. About 12:30.

Mr. Abrams: 12:30.

B.C.: Okay.

Chair Mahoney: We adjourn until 12:30?

Mr. Abrams: We need to go into executive session.

Ms. Higuchi-Sayegusa: Oh yeah, I'm sorry. I'll read the item and then we'll vote to go into exec. session.

Mr. Abrams: Okay.

EXECUTIVE SESSION

Pursuant to Hawai'i Revised Statutes sections 92-4, 92-5(a)(4), the purpose of this executive session for the Planning Commission is to consult with the County's legal counsel on questions relating to Zoning Amendment ZA-2016-3 Definition of Applicant. This consultation involves consideration of the Commission's powers, duties, privileges, immunities, and/or liabilities with regard to this agenda item.

Ms. Higuchi-Sayegusa: Chair, we are on H.1., Executive Session. Pursuant to Hawai'i Revised Statutes Sections 92-4, 92-5(a)(4), the purpose of this executive session for the Planning Commission is to consult with the County's legal counsel on questions relating to Zoning Amendment ZA-2016-3, Definition of Applicant. This consultation involves consideration of the Commission's powers, duties, privileges, immunities, and/or liabilities with regard to this agenda item.

Should we have a...?

Mr. Abrams: Move to go into executive session.

Ms. Nogami Streufert: Second.

Chair Mahoney: It's been moved and seconded. All in favor? (Unanimous voice vote) Motion carries 5:0.

The Commission recessed this portion of the meeting at 11:23 a.m.

The Commission reconvened this portion of the meeting at 12:46 p.m.

Chair Mahoney: Call the meeting back to order.

UNFINISHED BUSINESS (For Action)

Zoning Amendment ZA-2016-3: A bill for an ordinance Amending Chapter 8, Kaua'i County Code 1987, as amended, relating to Definitions = *County of Kaua'i, Planning Department.*

Mr. Dahilig: Thank you, Mr. Chair. We are on Item L.2. This is Zoning Amendment ZA-2016-3. A bill for an ordinance to amend Chapter 8, Kaua'i County Code 1987, as amended, relating to Definitions.

Mr. Chair, it would be the request of the Department at the Commission's pleasure to actually ask for a deferral on this item, and ask that it be deferred until such time as we can provide responses to the Commission based off of legal concerns. And at such time, we'll set the matter back on the agenda, when we receive a response and we are able to formulate a proper Director's Report.

Chair Mahoney: Okay. Chair will entertain a motion.

Mr. Abrams: Move to defer Item...well, wait. Let me see now.

Chair Mahoney: L.2.

Mr. Abrams: Pardon?

Chair Mahoney: L.2.

Mr. Abrams: Item L.2., Zoning Amendment ZA-2016-3, bill for an ordinance relating to Definitions. There will be no specific time. We'll just wait for the Department to report back to us.

Mr. Katayama: Second.

Chair Mahoney: Okay, it's been moved and seconded. Any discussion? Hearing none. All in favor? (Unanimous voice vote) Motion carries 5:0.

NEW BUSINESS (Continued)

Mr. Dahilig: Thank you, Mr. Chair. We have no further New Business under Item M.1.

ANNOUNCEMENTS

Topics for Future Meetings

The following scheduled Planning Commission meeting will be held at 9:00 a.m., or shortly thereafter at the Līhu'e Civic Center, Mo'ikeha Building, Meeting Room 2A-2B, 4444 Rice Street, Līhu'e, Kaua'i, Hawai'i 96766 on Tuesday, April 12, 2016.

Mr. Dahilig: Item N.2. We did provide the batting order sheets for the Commission. You'll see that it is starting to get a little heavy based off of our pre-consultation. We don't have dates set yet for tentative meetings, but you can see that there are a number of Homestays, as well as some other items relating to airplane hangars coming up. So when we are able to move dates, you'll see these start popping up as dates set. I do also want to remind the Commission that the next Commission meeting is on Tuesday, April 12th. We do not have a second meeting in March.

Largely it's because of spring break reasons and because of our intake load, we are able to move around that second meeting in March, so the next meeting will be the first meeting in April.

Chair Mahoney: Alright. Any further business?

Mr. Ho: Under New Business, can I bring up something that was discussed (at a) prior meeting, Mr. Chair?

Chair Mahoney: I guess so. (Laughter in background)

Ms. Higuchi-Sayegusa: I.e....

Chair Mahoney: Well not technically on...

Ms. Higuchi-Sayegusa: Right. So you're...I'm sorry. You want to propose something to be on the agenda for next time? Or...?

Mr. Ho: No, no, no, I don't. I just want to ask a question of the general membership here. It's related to Coco Palms.

Ms. Higuchi-Sayegusa: Oh, okay. So because it's not on the agenda, I would advise that we...

Mr. Ho: Okay.

Ms. Higuchi-Sayegusa: If we put it on the agenda, we can discuss anything on that. Or if you have separate questions, then maybe you could clarify with the Department.

Mr. Dahilig: We do have a Coco Palms agenda item as set by the Commission on April 26th. So if you would like us to put one on the 12th as well, we can provide a status discussion if you'd like one. If not, I can provide any answers to you concerning any questions in the interim for Commission information basis.

Chair Mahoney: Okay. No further business. Need a motion to adjourn?

Mr. Katayama: So moved.

Mr. Ho: Second.

Chair Mahoney: Moved and seconded. Meeting adjourned.

ADJOURNMENT

Chair Mahoney adjourned the meeting at 12:50 p.m.

Respectfully submitted by:

Darcie Agaran,
Commission Support Clerk

() Approved as circulated (add date of meeting approval)

() Approved as amended. See minutes of _____ meeting.